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IN THE

Supreme Court of the United States

October Term, 1984

JAMES F. O'BROCTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Was Petitioner deprived of a fair trial by the characterization of Petitioner's sole defense (lack of *mens rea*) as "spurious" in the Trial Judge's instructions to the jury, where such charge, upon defense objection, was followed by a "curative" instruction wherein the Judge stated the finding of spuriousness was "solely a conclusion that the Court drew," but effectively reiterated the Court's opinion that the logical underpinning of Petitioner's defense was "spurious"?

2. Was the prejudice described in Question 1, *supra*, exacerbated by the fact that the Trial Judge's opinion was based upon information not in evidence, or upon his erroneous construction of the testimony of the Government's expert witness, and was therefore doubly prejudicial in that it not only impeded on the jury's fact finding province, but injected extraneous information, contrary to the evidence, into the jury's deliberations?

3. Did defense counsel at trial, under Fed. R. Crim. P. 30, effectively preserve for appellate review his objections to the whole of the Trial Judge's seriously prejudicial charges, which included characterization of Petitioner's sole defense as "spurious," where, following an initial objection, an inadequate "curative instruction" was given, with no further objection following, where it appears on the record defense counsel was not given the opportunity to again object to the "cure"?

4. Was Petitioner deprived of a fair trial by the Trial Judge's refusal to allow him to elicit testimony from certain witnesses which would support Petitioner's

defense that he lacked the *mens rea* necessary for conviction?

5. Can Petitioner's conviction for conspiracy stand, given that it, too, is necessarily based upon the alleged intent of Petitioner, which Petitioner was unfairly prevented from refuting due to the Judge's rulings and charges?

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The Petitioner, JAMES F. O'BROCTA, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 2, 1984.

Opinion Below

The opinion of the Court of Appeals for the Third Circuit appears in the Appendix hereto. It is reported, *sub nom United States v. Olgin*, at 745 F.2d 263 (1984). No opinion was rendered by the District Court for the Western District of Pennsylvania.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 2, 1984. An application requesting a thirty-day extension of the time period in which Petitioner could file his Petition for a Writ of Certiorari was filed with the Supreme Court and served upon the Solicitor General on November 7, 1984. An Order Extending Time To File Petition for Writ of Certiorari was granted November 20, 1984 by William Brennan, Associate Justice of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

UNITED STATES CODE, TITLE 18:

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

UNITED STATES CODE, TITLE 26:

§7206. Fraud and False Statements.

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return,

affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . .

shall be guilty of a felony . . . .

UNITED STATES CODE, TITLE 18:

Federal Rules of Criminal Procedure Rule 30. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Statement of the Case

Petitioner JAMES F. O'BROCTA was convicted, following a jury trial in the United States District Court for the Western District of Pennsylvania, Gerald J. Weber, J., presiding, of one count of conspiracy to defraud the United States by impeding the Internal Revenue Service's efforts to ascertain and collect taxes in violation of 18 U.S.C. §371 (1982), and of three counts of willfully assisting in the preparation and filing of, and subscribing to, false income tax returns in violation of 26 U.S.C. §7206 (1982). Jurisdiction of the District Court was based upon said statutory provisions.

Petitioner was originally charged under the four separate counts, of which he was ultimately convicted, in a sixteen count indictment. The first count alleged a conspiracy, in combination with Gerald Olgin, Marilyn Olgin and Jerome Shapiro, to defraud the United States of America through violation of 18 U.S.C. §371 (1982). Counts two through thirteen were directed against various of those three Defendants. Gerald Olgin, former president of Penn Iron and Metal Company, Inc., pleaded guilty to the conspiracy count prior to Petitioner's trial. In return, the Government agreed to drop all of the remaining charges against Olgin, his wife Marilyn, and his brother-in-law Jerome Shapiro. Thus, Petitioner alone went to trial under the conspiracy count and the three counts of knowingly aiding in the preparation and filing of, and subscribing to, false and fraudulent tax returns, and was convicted of all counts.

The convictions arose from acts committed by Petitioner in his position as president of Frank J. O'Brocta Salvage, Inc. with respect to corporate tax returns for the years 1976, 1977, and 1978. The record

shows, and Petitioner does not dispute, that during the years in question, Petitioner's corporation delivered scrap material to Penn Iron and Metal Co., Inc. and was paid for this by checks made out to fictitious payees. It is also undisputed that Petitioner cashed these checks, on behalf of O'Brocta Salvage, following their endorsement by Petitioner or, in certain instances, by an officer of the payor, and that Petitioner knowingly failed to report the proceeds in the 1976, 1977, and 1978 corporate tax returns as gross receipts. The returns were subscribed by, or prepared with the knowledge and assistance of, Petitioner. The Government, in its case, called thirteen witnesses, and effectively demonstrated that Petitioner underreported, on behalf of his corporation, the gross receipts of the corporation, and demonstrated also that these receipts derived from the funds received by Petitioner, on behalf of the corporation, via the Penn Iron and Metal Co., Inc. checks. Petitioner himself conceded this.

The Government concluded its case-in-chief with Internal Revenue Service Special Agent James Waldemarson, an expert-summary witness, who reviewed the evidence and rendered the opinion that the Gross Income for Frank J. O'Brocta Salvage, Inc. was underreported by $90,469.48 in 1976, by $74,820.01 in 1977, and by $92,787.98 in 1978.

Under cross-examination, Special Agent Waldemarson was asked: If Petitioner's corporation spent all unreported cash receipts on scrap inventory, bought from other parties, and did not report the expenditures, would the "Gross Profit" line on the corporate return be unchanged, notwithstanding the dual underreporting?

The witness answered that, if the material so bought remained in inventory, or was subsequently sold and said sales were reported, then the corporation's gross profit would be accurately reflected on the return. Following this statement of opinion, the Court ended defense counsel's line of questioning on the ground that it was "pure speculation, unsupported by anything in the evidence . . . ." (R. 345.)*

For similar reasons, the Court had previously refused, over defense objection, to permit similar questions to be posed to Petitioner's former accountant and to another Internal Revenue Service Special Agent, John A. Busse.

Petitioner's defense was that he lacked the *mens rea* to commit the conspiracy offense and the three substantive offenses. He took the stand and testified that he utilized the admittedly unreported cash receipts to purchase additional scrap inventory for Frank J. O'Brocta Salvage, Inc., that he also failed to report this expenditure in the corporate tax returns, under "Cost of Goods Sold," and that he believed this treatment of the unreported income and expense "netted out." Thus, Petitioner's testimony and defense was that he at all times believed he was not falsely representing a *material* fact, and that he had no intent or agreement to defraud or impede the Government's ascertainment and collection of revenue.

In his charge to the jury, Judge Weber correctly stated that Petitioner, to be convicted under 26 U.S.C. §7206, must have "willfully" subscribed, or aided in the

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* References entitled "R. _____" refer to the record before the Court of Appeals, which was wholly contained in the Appendix submitted with the briefs on appeal. References entitled "App. _____" refer to the Appendix included with this Petition.

preparation and subscription of, a materially false return, stating that by "willfully" he meant "a voluntary, intentional violation of a known legal duty." (R. 547.)

The Judge, however, went on to charge the jury that:

> "Gross receipts are material. There has been an admission here that gross expenditures were also falsely reported and an argument made that they should cancel each other out, and that is spurious, of course, in that it omits the consideration of inventory. If money is paid out to acquire goods, then those goods go into inventory, and so a false statement of any one of these things throws all the rest of the material on the return out of whack and unable to be understood."

(R. 548.)

The Judge continued with his charge, and told the jury several times that it was their duty to decide the facts of the case.

A verdict of guilty was returned on all four counts lodged against Petitioner.

Following his charge, the Judge called counsel to sidebar, at which time counsel for the defense immediately made several objections to the contents of the charge, the first and most important being the Judge's characterization of the argument that unreported gross expenditures would cancel out unreported gross income as "spurious." The Judge stated that he felt the Internal Revenue Service Agent's testimony supported his opinion (*i.e.*, that inventory would exist which would render false the argument upon which Petitioner's good faith defense was based). (R. 556-57.) Following further discussion of defense counsel's other exceptions to the charge, the Court supplemented his charge to the jury. Judge Weber stated that the spuriousness of Petitioner's defense argument was

"solely a conclusion that the Court drew," asked the jury to remember what the Government's expert witness stated, and told the jury that they were not bound by the Court's opinion as to the "logic[]" of Petitioner's argument. (R. 559-60.)

Immediately following this, the Court called the attendant forward to be sworn and sent the jury to deliberate. (R. 560.)

Petitioner was found guilty of all four counts lodged against him on June 30, 1983. He was sentenced on September 16, 1983 to fines of $10,000.00 on his conviction for count one (conspiracy) and $5,000.00 each on the three convictions under 26 U.S.C. §7206. Petitioner was further sentenced to concurrent terms of imprisonment of ten years on the conspiracy count and of five years on each of the three substantive counts, said terms to be suspended with concurrent periods of probation for five years imposed on each count. He was also ordered to perform certain public service activity without pay, not to exceed five hours per week.

The convictions were appealed to the United States Court of Appeals for the Third Circuit, which, in a two to one Decision, affirmed Petitioner's conviction. The grounds for appeal were that Appellant was deprived of an adequate opportunity at trial to convince the jury that he lacked the willfulness to commit the violations of §7206 of Title 26 of the United States Code, that he was deprived of an adequate opportunity at trial to convince the jury that he lacked the criminal intention necessary to commit the violation of §371 of Title 18 of the United States Code, and that the Government did not prove at trial that Defendant impeded the functions of the Internal Revenue Service.

In affirming Petitioner's convictions, the Court of Appeals stated:

> "The most troubling aspect of this appeal is the claim that the trial judge interferred with O'Brocta's attempt to pursuade the jury of his innocence by characterizing his defense as spurious."

745 F.2d at 266, App. at 5a. The Court, stating a four-pronged "sliding scale" test, said the following four factors were to be considered in determining whether a Judge's comments prejudiced a Defendant:

> "[1.] the materiality of the comment, [2.] its emphatic or overbearing nature, [3.] the efficacy of any curative instruction, and [4.] the prejudicial effect of the comment in light of the jury instruction as a whole."

745 F.2d at 268-69, App. at 10a through 12a.

The Court, in applying this test to Petitioner's case, held that,

> "whatever the limits of permissible judicial comment may be, the trial judge's comment in the case at bar did not transcend the boundary. While the Court does not endorse the judge's use of the word 'spurious,' it also does not find that under the test utilized today the inclusion of this one word amounted to reversible error."

745 F.2d at 270-71, App. at 14a.

The Court of Appeals additionally held that Petitioner failed to preserve his objection to the Judge's supplemental charge under Federal Rule of Criminal Procedure 30 because counsel did not renew his objection, or further object, following the supplemental instruction. 745 F.2d at 271, App. 14a through 16a.

The Court of Appeals also held that Petitioner was not deprived of an adequate opportunity to display his innocence by the Trial Judge's refusal to allow defense counsel to ask questions of a number of witnesses which pertained to the tax consequences (or lack thereof) of equally underreporting gross receipts and gross expenditures, and which also pertained to the unsuccessful results of the Internal Revenue Service's attempts to find any funds which Petitioner did not report on the corporate tax returns. 745 F.2d at 271-72, App. at 16a through 18a. The Trial Judge had curtailed defense counsel's questioning of Special Agents Busse and Waldemarson on the grounds of relevancy. He also curtailed defense counsel's questioning of Petitioner on the grounds of relevance and repetitiveness, and of Petitioner's former accountant on the ground of relevancy.

Finally, the Court of Appeals held that, contrary to Petitioner's arguments, the conspiracy conviction could stand despite the fact the Internal Revenue Service was not in fact impeded in its efforts to assess and collect revenue. 745 F.2d at 272-73, App. at 18a through 19a.

District Judge H. Lee Sarokin, sitting by designation, dissented. While agreeing with the substance of the majority's four-pronged test, it was his opinion that the test was misapplied in view of the overwhelming consequences which the Judge's statement of opinion must have had upon the jury:

> "The effect of [the Judge's] statement on defendant's case must have been devastating: the trial court judge appeared to be saying to the jury that he regarded defendant's argument, and with it, his whole defense, as 'spurious.' In so doing, he also expressed his opinion as to defendant's credibility.

> for such defense had been established primarily by defendant's own testimony. . . . and he did so by injecting into the case an issue not otherwise charged, explained, or presented to the jury by either party, precisely as in *Quercia* [*v. United States*, 289 U.S. 466, 471-72 (1933)]."

745 F.2d at 274-75, App. at 23a.

The dissent further argued that the majority erred in holding that the error, to the extent it existed, was mitigated by the balance of the Judge's initial charge and by the curative charge which followed. 745 F.2d at 274-76, App. at 23a through 27a.

The dissent concluded by stating that the majority's holding with respect to Petitioner's failure to object to the curative charge, pursuant to Federal Rule Criminal Procedure 30, was in error based upon the meaning and intent of the rule, strong Third Circuit precedent to the contrary, and the actual manner in which the Court abruptly concluded the supplemental charge and sent the jury to deliberate. Judge Sarokin also noted that the Government itself failed to raise and brief the issue of Petitioner's failure to preserve for review his objection to the supplemental charge until the issue was raised by the Court. 745 F.2d at 277, App. at 27a through 29a.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Acknowledged, But Failed To Uphold, The Important Constitutional Principle That A Trial Judge May Not Prejudice A Defendant With Comments That Both Misconstrue The Evidence And Invade The Jury's Fact Finding Province.

The Court of Appeals incorrectly held that Petitioner was not deprived of a fair trial despite prejudicial comments made by the Trial Judge in his charge to the jury. Over fifty years ago, in *Quercia v. United States*, 289 U.S. 466 (1933), the United States Supreme Court rendered a bedrock opinion which set forth the constitutional limitations upon a trial judge's right to comment, before the jury, on the facts and testimony before the Court during a pending trial. A judge, said the Court,

> "may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' "

289 U.S. at 470.

The Court in *Quercia* recognized the authority and power of a trial judge, express and implicit, and also recognized the principle of law, of immense importance to every participant in a jury trial, that the trial judge may guide, but not decisively influence, the jury's factfinding deliberations. This Court is now petitioned to review the Decision of the United States Court of Appeals for the Third Circuit, which affirmed, in a two to

one decision, the conviction of Petitioner JAMES F. O'BROCTA of three counts of willfully assisting in the filing of, or subscribing to, false corporate income tax returns in violation of 26 U.S.C. §7206 (1) and (2), and of one count of conspiring to defraud the United States by impeding the Internal Revenue Service's efforts to ascertain and collect revenue in violation of 18 U.S.C. §371.

As in *Quercia, supra,* Petitioner's objection to the conduct of the trial centers upon an untoward and highly prejudicial comment by the Judge during his charge to the jury, a comment which not only gutted Petitioner's sole defense, but was also based upon beliefs or information not in evidence, or the Judge's erroneous interpretation, or recollection of, a key witnesses's testimony.

The record reflects that JAMES F. O'BROCTA's defense to all charges leveled against him was that he lacked the *mens rea* to commit the requisite "willful" violation of the statutes in question. It was not disputed that Petitioner, as an employee and officer of Frank J. O'Brocta Salvage, Inc., sold scrap metal to Penn Iron and Steel, Inc. and was paid via checks made out to fictitious payees. Mr. O'Brocta, and others, signed the names of these payees and cashed the checks at local banks. The money received was not included in the gross receipts listed on Frank J. O'Brocta Salvage, Inc.'s federal tax returns. However, the record also indicates that Petitioner testified that he, on behalf of the corporation, used the cash so obtained to purchase new scrap for the O'Brocta Salvage Yard, and that the money so expended was also not reported on the federal income tax returns as an expenditure for goods purchased.

Petitioner took the stand in his own behalf and stated that he believed the nonreporting of the income and expenditure resulted in a mutual offset for purposes of taxation, and that it was therefore unnecessary to report the receipt if he did not report the correlative expense. The defense, therefore, was that Petitioner did not "willfully" make and subscribe, or aid or assist in the making or subscription of, a return which was fraudulent or false as to a "material matter." 26 U.S.C. §7206 (1) and (2).

Testifying, Petitioner told the Court and jury that the scrap business was run largely on a cash basis, *i.e.*, 99% of the customers who brought in scrap for sale to Frank O'Brocta Salvage, Inc. were paid in cash, not by check. It was therefore necessary to have a continual supply of large amounts of cash in the business. He also said the checks from Penn Iron and Metal Co., Inc. were not made payable to the corporation because they would have to be deposited, not cashed, thereby resulting in delay, and that the method of using checks payable to fictitious payees was instituted by Penn Iron and Metal Co., Inc., with little thought given to it by Petitioner. Mr. O'Brocta also testified that the money received from Penn Iron and Metal Co., Inc. through checks made payable to fictitious payees was utilized to buy further scrap metal from the entities which sold to Frank J. O'Brocta Salvage, Inc. Petitioner further testified that he believed that the dual nonreporting of gross receipts and gross expenditures had no tax consequences.

Thus, Petitioner's defense at trial was that he lacked the *mens rea* to commit both the conspiracy and the substantive charges leveled against him. 26 U.S.C. §7206, under which Petitioner was convicted, makes it a crime to "willfully" make and sign a return which the signer "does not believe to be true and correct as to

every material matter" (26 U.S.C. §7206(1)) or to aid in the preparation of a return "which is fraudulent or is false as to any material matter . . . " (26 U.S.C. §7206(2)).

James Waldemarson, Corporation Examination Program Coordinating Agent for the Internal Revenue Service, testified in an expert capacity as the Government's Summary witness at Petitioner's trial. When asked upon cross examination whether equal unreported sales and subsequent unreported purchases would net out and result in no tax liability, Mr. Waldemarson said:

> "Number one, you have to make the assumption if the unreported sales and the unreported purchases are equal, if, number one, there is no subsequent disposition of the unreported purchase—or of the purchases—in other words, *it comes in and stays right in inventory—your assumption is correct.* If it comes in and it is subsequently sold and that following sale is reported, your assumption is correct."

(R. 344.) (Emphasis supplied.) This expert testimony directly and importantly bears upon the objectionable jury instruction, *infra.*

In his charge to the jury, District Judge Weber initially correctly stated:

> "Now, the essential element and the one which is the sole source of disagreement between the parties here is the word, 'Willfully,' in the statute, and the shortest definition of that, for the purpose of this case, is it could not—it means a voluntary, intentional violation of a known legal duty. It must be shown by the evidence that the Defendant knew that the information on the return was false and that he knew it was contrary to the law to furnish false information."

(R. 547.)

Shortly thereafter, however, the Trial Judge went on to say:

> "The violation of the statute is complete if it is shown that the Defendant deliberately and with knowledge that it was contrary to law gave a false account of any material item on the report. Gross receipts are material. *There has been an admission here that gross expenditures were also falsely reported and an argument made that they should cancel each other out, and that is spurious, of course, in that it omits the consideration of inventory.* If money is paid out to acquire goods, then those goods go into inventory, and so a false statement of any one of these things throws all the rest of the material on the return out of whack and unable to be understood."

(R. 548.) (Emphasis supplied.)

Following the completion of his charge, the Judge requested counsels' presence at sidebar, and Petitioner's counsel voiced various objections to the charge. The first and most important was the Judge's statement that the basis of Petitioner's defense was "spurious." A portion of the colloquy between counsel and the Court went as follows:

> "MR. ABRAMOWITZ: You talked about the term [spurious] when discussing about offsetting expenses or income would not cancel each other out, even taking into consideration inventory—
>
> "THE COURT: Wait a minute. If he buys goods and does not report it, which he said he did, then he has some inventory in there, and, at the end of the year, he has to count up the inventory and get a figure for that.
>
> "MR. BRUTMAN: He did. There is inventory shown.

> "THE COURT: I known, but we don't know—I know what you are talking about. *The testimony of the Internal Revenue Agent shows that just those two were not enough.* All right. It is noted. Anything else?"

(R. 556-57.)

At the conclusion of the sidebar conference, the Court, in an apparent attempt to respond to defense counsel's exception to the charge, stated:

> "With respect to the Court's comment on whether or not the receipts of money and the expenditures of money and cash—I may have used the word 'spurious.' That is solely the opinion of the Court and does not bind the jury in any way as to whether or not that would be a logical contention to make, that these two cancel each other out."

(R. 559-60.)

The Court then concluded its charge, called the attendant forward to be sworn, and sent the jury to deliberate.

The jury returned with a verdict convicting Petitioner of all four counts with which he was charged in the indictment.

On appeal, the United States Court of Appeals for the Third Circuit affirmed the convictions. The Court recognized that:

> "The most troubling aspect of this Appeal is the claim that the Trial Judge interferred with O'Brocta's attempt to pursuade the jury of his innocence by characterizing his defense as spurious."

745 F.2d at 266, App. at 5a. The Court acknowledged *Quercia v. United States*, 289 U.S. 466 (1933) as the

controlling case with respect to prejudicial judicial comments, 745 F.2d at 268, App. at 9a, and stated that:

> "There is no bright line separating remarks that are appropriate from remarks that may unduly influence a jury."

745 F.2d at 268, App. at 10a.

The Court set forth a four-pronged "sliding scale" test to determine whether a criminal defendant has been prejudiced. The four factors to be considered, said the Court, are

> "[1] the materiality of the comment, [2] its emphatic or overbearing nature, [3] the efficacy of any curative instruction, and [4] the prejudicial effect of the comment in light of the jury instruction as a whole."

745 F.2d at 268-69, App. at 10a through 12a.

It is submitted that the Court of Appeals, in upholding Petitioner's convictions, did not properly apply the test which it set forth. The Court concluded that the portion of the charge which stated Petitioner's "offset" belief to be "spurious" did *not* go to core of Petitioner's defense; was *not* an emphatic statement of disbelief of Petitioner; was effectively cured by the supplemental charge; and was relatively innocuous compared to the charge taken as a whole. 745 F.2d at 270, App. at 13a through 14a.

In *Quercia v. United States*, 289 U.S. 466 (1933), this Court noted the "inherent limitations" upon a trial judge's right to comment upon evidence. 289 U.S. at 470. A biased comment by the judge must not, said the Court, "render vain the privilege of the accused to testify in his own behalf." *Id.* at 470. While critical of all judicial comments which go beyond helpful guidance and stand as a usurpation of the jury's factfinding duty, the

Supreme Court was most critical of prejudicial judicial commentary not based upon the evidence. *Id.* at 470-71. *See also Starr v. United States*, 153 U.S. 614, 626 (1894):

> "[D]eductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice."

Reversal was thus mandated where "the trial judge did not analyze the evidence; [but] added to it, and . . . based his instruction upon his own addition." *Quercia*, 289 U.S. at 471.

In the instant case, the trial judge labeled "spurious" the logical basis of Petitioner's sole defense, *i.e.*, that equal underreporting of incoming cash and expenditures for inventory would offset each other, with no resultant tax liability or reporting obligation. The Government's expert witness, Special Agent James Waldemarson, had in fact testified that a non-taxable situation would in fact result if the inventory so purchased "comes in and stays right in inventory . . .," *supra*. Thus, the judge's comment was factually prejudicial because, notwithstanding the balance of the charge, it caused the jury to disbelieve Petitioner and his defense, and, more importantly, because it was based, not on evidence, but on the judge's own opinion or his misconstruction of the Government witness's testimony. In fact, he told defense counsel at sidebar, following his objection to the initial charge:

> "If he buys goods and does not report it, which he said he did, then he has some inventory in there, and, at the end of the year, he has to count up the inventory and get a figure for that . . . . *The testimony of the Internal Revenue Agent shows that just those two were not enough.*"

(R. 556-57.) (Emphasis supplied.) The judge's comment, then, was highly prejudicial and erroneously based. No

other part of the charge serves to save the case from a mandated reversal. *See* dissenting opinion below, 745 F.2d at 274-276, App. at 23a through 27a. And the "curative" instruction does not right the wrong, either, for the judge reiterated his opinion. *Cf. Quercia v. United States*, 289 U.S. 486, 472 (1933):

> "Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn."

An overwhelmingly important principle is at issue here. The Supreme Court's last major statement in the area is over fifty years old. While the case retains its legal vitality as a leading statement of law, the opinion below indicates that certiorari to review should be granted, so that this Court may reaffirm the importance of a criminal trial free of prejudicial comments by the presiding judge.

2. The Court Of Appeals Erred In Interpreting Federal Rule Of Criminal Procedure 30 To Mean That Petitioner Failed To Object To The Efficacy Of The Trial Judge's Supplemental Instruction.

Federal Rule of Criminal Procedure 30 governs United States District Court jury instructions. It states in part:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

> *Opportunity shall be given* to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

(Emphasis supplied.) The United States Court of Appeals for the Third Circuit held that Petitioner failed to object to the curative instruction given by the Court following Petitioner's initial objection to the jury charge because no further objection was made. The record clearly indicates that, in fact, the requisite opportunity to object was not given. While the Trial Judge called counsel to a sidebar conference following the initial charge, keeping the jury waiting at the time, no such opportunity was given following the supplemental charge. Rather, the Court summarily finished the charge, called the Court attendant forward to be sworn, and sent the jury to deliberate. Counsel would, literally, have had to chase the Judge into Chambers to voice an objection. (R. 560) *See also,* 745 F.2d at 277, App. at 28a-29a (Sarokin, J., dissenting).

In so holding, the Third Circuit Court of Appeals effectively overruled that part of *United States v. Currens,* 290 F.2d 751, 758-59 (3d Cir. 1961) which held that failure to object to a supplemental charge did not insulate from appeal issues presented therein. By failing to give Petitioner's counsel the opportunity to object to the curative charge, the Trial Judge prevented counsel from raising further issues with respect to the "cure" which in fact aggravated the prejudice more than it relieved it. *Supra,* at Reason 1. By preventing counsel from voicing further objections and requesting further supplementation, the Court fixed in the minds of the jury the prejudicial opinion expressed by the Judge.

The prejudice to Petitioner, from both the original charge and the supplement, are set forth in the first

Reason for Granting the Writ, *supra*. Reversal is therefore mandated under this Court's opinion in *Hamling v. United States*, 418 U.S. 87, 134-35 (1974). At a minimum, even if reversal is not required based solely upon the Rule 30 violation, it must nevertheless be held that Petitioner was, at any rate, not foreclosed from raising objections to the "curative" charge on appeal.

3. Petitioner Was Prevented From Fully Asserting His Good Faith Defense At Trial Due To The Court's Refusal To Permit Lines Of Questioning Which Would Prove Exculpatory.

This Court, in two cases, *United States v. Bishop*, 412 U.S. 346 (1973) and *United States v. Pomponio*, 429 U.S. 10 (1976) has defined the meaning of the term "willfully" as used in 26 U.S.C. §§7206(1) and 7206(2). In *United States v. Bishop, supra*, "willfully" was defined as "a voluntary, intentional violation of a known legal duty." "Willfully," said the Court, required proof of "bad purpose or evil motive."

Petitioner's counsel at trial curtailed, on numerous occasions, questions posed to various witnesses through which Petitioner attempted to show that unreported cash receipts, if used to buy unreported inventory, would offset each other and result in no tax liability. Although Petitioner was not on trial for tax evasion, such evidence would bolster his defense of lack of *mens rea* insofar as the conspiracy charge and false and fraudulent reporting charges were concerned.

The Judge refused to allow counsel to put questions of this nature to Petitioner's former accountant, to Internal Revenue Service Special Agent John A. Busse, to Internal Revenue Service Special Agent James Waldemarson, and to Petitioner himself. Petitioner's

counsel also sought to question a Government witness with respect to his inability to find any secreted funds through the use of information subpoenas, again hoping to indicate that Petitioner did not benefit by his non-reporting and therefore had no intent to falsely report any material facts. Judge Weber put an end to this line of questioning also.

Certiorari should be granted to review the Court of Appeals affirmation of the Trial Court's evidentiary rulings, for Petitioner was clearly thwarted in his attempts to show to the jury his lack of willfullness and intent with respect to the charges of conspiracy to defraud the United States and the subscription of, and filing of, false and fraudulent returns.

Conclusion

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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December 31, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5702

UNITED STATES OF AMERICA

v.

GERALD OLGIN, MARILYN OLGIN,
JEROME SHAPIRO, JAMES F. O'BROCTA

James F. O'Brocta, Appellant

On Appeal from the United States
District Court for the
Western District of Pennsylvania
(Crim. No. 83-00029-E)

Argued April 23, 1984

Before: ADAMS, BECKER, *Circuit Judges*,
and SAROKIN, *District Judge**

(Opinion Filed October 2, 1984)

ROBSHAW & ABRAMOWITZ, P.C.
Philip B. Abramowitz,
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Buffalo, New York 14202

Attorneys for Appellant

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* Hon. H. Lee Sarokin, United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

James O'Brocta has been convicted of conspiring to defraud the United States by impeding the Internal Revenue Service's efforts to ascertain and collect revenue in violation of 18 U.S.C. § 371 (1982). He has also been convicted of three counts of willfully assisting in the filing of and subscribing to false corporate income tax returns in violation of 18 U.S.C. § 7206 (1982).[1] O'Brocta was sentenced to concurrent terms of imprisonment on the conspiracy and the substantive counts; these terms were suspended by the trial judge, and concurrent periods of probation were imposed for each count. A fine was also imposed.

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1. The Internal Revenue Code provides that any person who

> [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does

O'Brocta argues on appeal that the evidence adduced against him at trial is insufficient to support a conviction for conspiracy and that the trial judge's comments during the charge so tainted the jury's verdict as to deprive him of an adequate opportunity to defend himself. We cannot agree with O'Brocta's contentions and the convictions will therefore be affirmed.

I.

O'Brocta is president of a salvage company whose business is the buying and selling of scrap metal. Between 1975 and 1978, O'Brocta regularly sold scrap to Penn Iron and Metals Company. Gerald Olgin, the president of Penn Iron, testified at O'Brocta's trial that, when a seller of scrap asked for payment in cash, the firm would write a check to a fictitious payee, cash the check, and pay the seller. O'Brocta frequently received payment under this scheme, and he frequently personally cashed the checks drawn to the order of fictitious payees. O'Brocta did not include in his corporate records the receipts from sales of scrap to Penn Iron paid by such checks or cash. Although O'Brocta was responsible for the preparation of the corporate tax returns of his salvage company, he did not inform his accountants of the sales to Penn Iron,

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not believe to be true and correct as to every material matter: or ... [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document: ... shall be guilty of a felony.

26 U.S.C. § 7206 (1982)

which were, consequently, not reported on the tax returns filed by the corporation for 1976, 1977, and 1978.[2]

O'Brocta's primary defense at trial was that he lacked the *mens rea* required for a criminal conviction because he believed that the failure to report cash payments was not improper and would not affect the computation of his tax liability. To support the latter contention, O'Brocta attempted to show that he used the cash received from Penn Iron to purchase scrap for his own business. He claimed that he never recorded these purchases and, consequently, that the cost of goods sold, as reported on the allegedly inaccurate returns, was understated by the same amount as the report of gross receipts. Thus, O'Brocta argued, he did not intentionally violate a known legal duty in understating gross receipts because he believed that he had fulfilled his legal obligation by accurately stating gross profits and correctly computing the income tax owed on this amount.

On appeal O'Brocta argues that the trial judge deprived him of the right to convince the jury that he lacked the intent necessary to conspire or to commit the substantive crimes. He charges that the trial court erred in not allowing him to elicit certain testimony from various witnesses and that this error was compounded by the characterization of his defense as "spurious" in the judge's remarks to the jury. Finally, O'Brocta maintains that the conspiracy conviction

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2. The unreported gross receipts of the corporation amounted to $90,469.48 in 1976, $74,820.01 in 1977, and $92,787.98 in 1978. O'Brocta signed the returns for 1977 and 1978; his brother signed the return for 1976. The returns bore the following preprinted statement above the signature block: "Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete."

cannot stand because the government has failed to prove that the IRS was actually impeded by the system of cash payments made to him or his corporation by Penn Iron.

II.

The most troubling aspect of this appeal is the claim that the trial judge interfered with O'Brocta's attempt to persuade the jury of his innocence by characterizing his defense as spurious. That remark was made during the recitation of the jury instructions:

> There is a particular statute or two particular sections of the same statute that make the giving of the false information a violation of the law, regardless of whether there was any income tax to be paid or due, regardless of whether the United States suffered any loss or not. No pecuniary loss, no monetary loss, need be suffered by the United States. The violation of the statute is complete if it is shown that the Defendant deliberately and with knowledge that it was contrary to law gave a false account of any material item on the report. Gross receipts are material. There has been an admission here that gross expenditures were also falsely reported and an argument made that they should cancel each other out, and that is spurious, of course, in that it omits the consideration of inventory. If money is paid out to acquire goods, then those goods go into inventory, and so a false statement of any one of these things throws all the rest of the material on the return out of whack and unable to be understood.

App. at 548.

Immediately after these remarks, the judge explained that the jury must determine whether the defendant had "acted willfully, in the sense that he

knew what he was doing was contrary to law, and he knew that the statements were false." "[N]o one should be convicted," the judge emphasized, "if he acted by mistake or inadvertence or some other reason. He has to know what he was doing and know that it was contrary to the requirements of law."[3] App. at 548-49.

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3. Immediately before the remark in question, the trial judge explained to the jury that:

> It is only as to the last element that there is a substantial dispute between the parties, and that has to do with the mental element. The Government must prove from the evidence that the Defendant did not believe the tax return to be a true and correct report as to a material matter. If the Defendant willfully understated gross receipts in a substantial manner, in a substantial amount, such an understatement constitutes a false material matter.
>
> ... This is not, as you may surmise from various arguments about the admission of evidence, a charge of tax evasion. It is solely a charge of making a false report, materially false in a substantial amount, and that is all that is required, except that it must be done with the mental state that it is willfully and knowingly false.... Now, the essential element and the one which is the sole source of disagreement between the parties here is the word, "Willfully," in the statute, and the shortest definition of that, for the purpose of this case, is ... a voluntary, intentional violation of a known legal duty. It must be shown by the evidence that the Defendant knew that the information on the return was false and that he knew it was contrary to the law to furnish false information. This is the sum and substance of what we call the mental state that is required to be proven, and it is stated in a few words: he knowingly gave the false information, knowingly, in the sense that he knew it was wrong and that he knew that to give wrong information violated the law.

App. at 546-48.

These remarks repeated an earlier and more specific reference to the intent requirement of the statutes under which O'Brocta was being prosecuted:

> Do the facts which have been drawn before you, are the things which were done, consistent with a certain state of mind, which is the issue in this case? There is no dispute, there is no denial, that the tax return in question for the three years was false. The Defendant admits that it was, when it say [sic], "Total Receipts," that the total receipts weren't there, and that is undisputed. There is no dispute that the Defendant did not record all the receipts that he got. The dispute here is as to his state of mind, because that is an element of the crime for which he is charged, that he knowingly and willfully gave false information.

App. at 528.

The most explicit or at least the most complete explanation of the elements of the crimes with which O'Brocta was charged came later:

> If you find beyond a reasonable doubt, from all the evidence in the case, that the Defendant willfully signed the tax returns for 1977 and '78, that the return was false as to a material matter, and that he knew that the false return was false, then the offense is completed.... [W]ith respect to the '76 return, you must find that the Defendant aided or assisted in or procured or advised the preparation of a return, that the return was false as to a material matter, and that the Defendant did it willfully, that is, knowing that it was contrary to law, knowing that it was false....
>
> The terminology as used in this statute means that the acts are done voluntarily and purposefully, and not because of a mistake or accident or some other innocent reason....

> So remember that the critical element in this case, and the only one in real dispute, is the mental state of the Defendant, that it must be shown that he willfully did the act, knowingly doing something which he knows the law forbids.... If the evidence leads you to conclude that the Defendant acted in good faith in order to conform to the law, that would not meet the test of willfulness. The Government must prove the Defendant's conduct in supplying the allegedly false information to his accountant was willfully done, with the specific intent to violate what he knew his legal duty to be. He must be shown to have acted voluntarily and intentionally to violate a known duty. The evidence must show that James O'Brocta knew that his conduct was unlawful, that a particular act or failure to act here was a violation of the law.
>
> You may consider all these matters. You may consider if he acted because he, in truth and honesty, believed that his offsetting of purchases would offset the cash received not reported, made his act without any tax consequences. Then, you may consider that in connection with the willfulness.
>
> Is there evidence here which raises a doubt that he acted willfully about any fact by which is shown in the evidence to excuse that state of mind? Did he, in good faith, believe that the method of offsetting expenses that he has testified to rendered it unnecessary for him to give truthful reports? Then, you may consider that for the purpose of determining whether he acted willfully.
>
> So, in summation, a conviction of willful violation of the tax laws must show an intentional violation of a known legal duty, which the Government must prove beyond a reasonable doubt.

App. at 550-53.

We must determine on this appeal whether the trial judge's use of the word "spurious" in his charge, in light of the circumstances, constitutes reversible error. In order to assist the jury in its deliberations, the trial judge may, within certain limits, comment upon the evidence. *See Quercia v. United States*, 289 U.S. 466, 469 (1933). When doing so, however, the trial judge must not unduly influence the jury's decision, thus denying the defendant his right to trial by jury. The Supreme Court has stated that

> In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attetion to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.

Quercia, 289 U.S. at 466. The Supreme Court added:

> The privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This Court has accordingly

> emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided."

Id. at 470 (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)).

There is no bright line separating remarks that are appropriate from remarks that may unduly influence a jury. Although not explicitly articulated, this Court has balanced a number of factors and has employed what might be termed a sliding scale approach to assess the propriety of a trial judge's comments during a charge to the jury. Specifically, this Court has considered four factors: the materiality of the comment, its emphatic or overbearing nature, the efficacy of any curative instruction, and the prejudicial effect of the comment in light of the jury instruction as a whole.

On appeal, the materiality of the challenged comment is a preliminary focus of inquiry. The reviewing court should be more concerned with a comment on a matter central to the defense than with a comment on a tangential issue. *See United States v. Anton*, 597 F.2d 371, 374 (3d Cir. 1979). The fact that the judge in *Anton* commented on the defendant's credibility, an issue "central to his defense," was one factor in this Court's reversal of the conviction. *Id.*

A second consideration for the reviewing court is the strength of the challenged comment. The reviewing court must be concerned with "emphatic or overbearing remarks" that a jury may accept as controlling. *United States v. Gaines*, 450 F.2d 186, 189 (3d Cir. 1971). For example in *Anton*, 597 F.2d at 372-73, the trial judge commented that he regarded the defendant "*as devoid of credibility*" and that he did "*not believe [defendant] absolutely and in all*

respects."[4] Thus, in *Anton*, the emphatic nature of the judge's statement provided a second ground for the reversal of the jury verdict. *Id.* at 374. However, a statement that questions the validity of an assertion, but does not flatly or emphatically dismiss the testimony, is of less concern. *See, e.g., United States v. Blair*, 456 F.2d at 514, 519 (3d Cir. 1972); *Gaines*, 450 F.2d at 188-89.

The efficacy of any curative instruction must also be considered. In many cases, a trial judge's comment which potentially could constitute reversible error can be counterbalanced by a curative instruction. *See, e.g., Blair*, 456 F.2d at 519. For such an instruction to be effective, the judge must clearly explain to the jury that it is free to disregard his remarks and must determine the facts and decide the case on its own. Both the number and clarity of such instructions are to be considered.[5]

Finally, the reviewing court must assess the prejudicial effect of the comments in light of the jury instruction as a whole. A potentially prejudicial comment cannot be evaluated in isolation, out of

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4. Another example of an overly emphatic judicial statement is found in Stevens v. United States, 306 F.2d 834, 838 (5th Cir. 1962) in which the court reviewed a statement by the trial judge who stated:

> All right. I don't believe I want to hear any more testimony from this witness. I want to certify in the record that the Court wouldn't believe him on oath, and I don't want to waste the jury's time taking any more testimony from him.

See also Gaines, 450 F.2d at 192 (quoting *Stevens*).

5. While the repetition of a curative instruction by itself is not determinative of the power to remove the prejudice, such repetition may be helpful. In *Gaines*, for example, the trial judge told the jury six times during his charge that it had to make the ultimate adjudication in the case. *Id.* at 190.

context. Rather, the reviewing court must examine the entire jury instruction to assess the true impact of the challenged remark. *See Gaines*, 450 F.2d at 190.[6]

Under the sliding scale approach the reviewing court must balance the above-mentioned factors. The stronger the potential prejudicial effect of a statement is, the stronger must be the mitigating factors. There may be cases in which the trial judge's comments are so out of bounds that no cautionary instruction to the jury could remove their prejudicial effect. For example, in *Anton* this Court held that the judge's statement of utter disbelief as to the defendant's credibility constituted reversible error. Despite clear curative statements before and after the comment, the Court stated that "[where] a court has expressed its opinion on a pivitol issue in the case, and has expressed that opinion in a strong, unequivocal and one-sided fashion, abstract instructions regarding the jury's role as fact finder are not a sufficient remedy." *Anton*, 597 F.2d at 375; *see also Quercia v. United States*, 28[illegible] U.S. 466, 469-72 (1933) (judge's comment, in reference to defendant, that "'wiping' one's hands while testifying was 'almost always an indication of lying'" constituted eversible error). In cases in which the prejudicial effect of a judicial comment is not so egregious as to be uncorrectible, the appellate court must weigh the totality of the factors in determining whether the quantum of harm from a statement amounts to reversible error.

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6. Another relevant factor for the Court to consider in assessing the nature of a judge's comments is the presence of any bias by the judge towards either of the parties. *Cf. United States v. Kravitz*, 281 F.2d 581, 584-85 (3d Cir. 1960) (noting the judge's comments were not "venomous"), *cert. denied*, 364 U.S. 941 (1961). In the present case, there is nothing to indicate any prejudice on the part of the trial judge against O'Brocta. In fact, the judge used his discretion to suspend O'Brocta's sentences of incarceration and to order probation instead.

III.

The test described above must now be aplied to the trial judge's characterization of the defense testimony on parallel underreporting of gross income and gross expenditures as "spurious." It is important to note that the charge against O'Brocta was not tax evasion, but the willful filing of inaccurate reports. Thus O'Brocta's state of mind, not the actual tax consequences of such a procedure, was at issue. The trial judge's comment on the effect of the underreporting might well have been intended merely to alert the jury that this line of defense was not particularly relevant to the charge against O'Brocta. Consequently, any prejudicial effect of the judge's comment was necessarily less than in *Gaines* in which the judge's remarks went to the core of the defense.

The trial judge's statement was also not nearly as strong as the statement of utter disbelief in *Anton*. The judge's opinion that the evidence was spurious is much closer in tone to the statement in *Blair* that the judge thought the money orders in dispute had been altered. 456 F.2d at 519.[7]

In addition to the fact that use of the word "spurious" had limited prejudicial effect, the judge issued a curative instruction to the jury in response to defense counsel's objection to its use:

> I have said, ladies and gentlemen, that the false statements on the returns and the false entries in the books are not in dispute. They have been admitted. The only question left is the question of mental state; that is, the willfulness....
>
> With respect to the court's comment on whether or not the receipts of money and the expenditures of money and cash -- I may have used the word

7. The judge in *Blair* cured his statement by giving the jury a cautionary instruction. 456 F.2d at 519.

> "spurious." That is solely a conclusion that the court drew. You have heard the testimony of the Government's expert witness with respect to what the effect of the misstatement of both of those are on other matters here. The opinion of the court there that there is inventory is solely the opinion of the Court and does not bind the jury in any way as to whether or not that would be a logical contention to make, that these two cancel each other out.

App. at 559-60. This cautionary instruction is similar to one which the Court found to be sufficient in *Blair*, 456 F.2d at 519.

Finally, the judge's use of the word "spurious" must be evaluated in light of his entire charge. *See Gaines*, 450 F.2d at 190. In the present case, the judge repeatedly, and correctly, told the jury that its task was to determine whether O'Brocta willfully signed tax returns which he knew were false as to a material matter. The use of one ill-advised word within an entire charge to the jury does not, in this context, constitute reversible error.

Thus, whatever the limits of permissible judicial comment may be, the trial judge's comment in the case at bar did not transcend the boundary. While the Court does not endorse the judge's use of the word "spurious," it also does not find that under the test utilized today the inclusion of this one word amounted to reversible error.

IV.

Finally, we note that the defense failed to object to the effectiveness of the judge's curative instruction. According to Fed. R. Crim. P. 30,[8] it was incumbent

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8. Fed. R. Crim. P. 30 provides (in pertinent part) that

> [n]o party may assign as error any portion of the charge or omission therefrom unless he objects

upon defense counsel to request a further curative instruction or to register an objection to the efficacy of the one already presented to the jury before the jury retired to consider its verdict. The policy behind rule 30 -- to prevent needless retrying of cases when the defect complained of could have been cured at the first trial -- is an important one. *See United States v. Currens*, 290 F.2d 751, 759 (3d Cir. 1961).

Thus counsel's lack of a timely challenge to the efficacy of the judge's curative instruction, as required by rule 30, forecloses assigning as error that portion of the charge. Our decision today is in keeping with the spirit of *Currens*. In *Currens*, this Court noted the important procedural purpose of rule 30, but warned against employing it "woodenly" so as not to become a "trap for the unwary." *Currens*, 290 F.2d at 759. The defense strategy in *Currens* was based on the Durham formula for insanity, yet the trial judge refused the defense's request to utilize this standard in his charge to the jury. The defense's challenge to the judge's instructions was somewhat vague. However, because the defense was based on the Durham formula, and the trial judge instructed the jury according to the M'Naghten Rule, we held that rule 30 did not bar defendant's appeal.

The present case is quite different. Defense counsel did object to the judge's use of the word "spurious," but not to the efficacy of his curative instruction. These two points, while related, are different. An appellate court could have ruled for the defendant on either of these grounds separately; thus both points had to be preserved for appeal. As in *Anton*, we might have found the judge's comment to be so prejudicial that no cautionary instruction could have removed the taint. Conversely, we could have found

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thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

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that the judge's remark was sufficiently prejudicial to require a cautionary remark but that the cautionary remark made by the judge was inadequate. In the latter case, the policy behind rule 30 mandates that defendant raise an objection at trial so that a second trial might be avoided. In light of the totality of the circumstances, the judge's remark did not amount to reversible error.

V.

O'Brocta also argues that he was deprived of an adequate opportunity to persuade the jury of his innocence as a result of the trial judge's decision not to allow certain questions to be put to government and defense witnesses. In general, the trial court's rulings precluded extensive inquiry into two matters: 1) the effect on tax liability of equally underreported receipts and purchases, and 2) the results of the government's efforts to locate the funds O'Brocta had not reported in his tax returns.

On cross-examination, defense counsel sought to question O'Brocta's accountant and Special Agents Busse and Waldemarson about the tax consequences of using unreported gross receipts to make unreported purchases of scrap metal. Waldemarson was permitted to testify that equal, unreported receipts and purchases would lead to a correct computation of gross profits on an income tax return. Busse was allowed to testify that O'Brocta had informed him that the Penn Iron payments "were used for cash purposes and [therefore] netted out." App. at 272. Nevertheless, it is true that the trial court generally limited inquiry into this area, having concluded that such questioning was irrelevant.[9]

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9. O'Brocta was charged with conspiring to defraud the United States by impeding the IRS's efforts to ascertain and collect revenue in violation of IRC § 371 and willfully assisting in the

It is well settled that a tax deficiency is not an element of the offenses with which O'Brocta was charged. *See, e.g., United States v. Cohen*, 617 F.2d 56, 58 (4th Cir.), *cert. denied*, 449 U.S. 845 (1980); *United States v. Johnson*, 558 F.2d 744, 746 (5th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978). As these cases reveal, evidence of tax liability is generally inadmissible in prosecutions under I.R.C. § 7206, and a trial judge is certainly correct in taking care that a jury does not misperceive a charge of false reporting as an allegation of tax evasion. Moreover, as the district court repeatedly emphasized, the sole issue at trial was O'Brocta's state of mind when he helped prepare or signed the incorrect tax returns. If the returns were submitted in good faith, the defendant would be entitled to an acquittal on the charges specified in the indictment, whether or not his tax liability had been correctly computed. Conversely, if the defendant knowingly and willfully filed incorrect returns in violation of a legal duty, he would be guilty of the offenses charged, again regardless of the tax consequences of the inaccurate information. Particularly since defense counsel was permitted to make the somewhat questionable point about the effect of dual underreporting on tax liability,[10] we can perceive no error in the trial judge's decision to limit testimony on this issue.

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filing of and subscribing to false corporate income tax returns inviolation of IRC § 7206. O'Brocta was not charged with tax evasion.

10. Busse and Waldemarson were not the only witnesses to testify as to the effect of underreporting on tax liability. Frederick Kern, an accountant hired by O'Brocta, was cross-examined extensively on this issue. App. at 228-31. In a supplemental memorandum submitted to the Court, the government questions the conclusion that equal underreporting has no tax consequences. We do not find it necessary to address this matter in resolving the issues raised on appeal.

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O'Brocta also asserts that he was not allowed to testify fully that he had not converted the unreported gross receipts to his personal use and that he was not permitted to question Agent Busse about the government's efforts to locate these receipts. During direct examination, O'Brocta did testify at length about his spartan lifestyle.[11] The trial court properly terminated this testimony after the prosecution objected on the grounds of irrelevance and repetitiveness. The questions to Agent Busse as to the government's failure to locate the unreported funds were likewise irrelevant to O'Brocta's defense because they only peripherally bore on his state of mind in filing an incorrect tax statement and had the potential of confusing the members of the jury into thinking that the case before them turned on tax evasion. We can find no error in the trial court's evidentiary rulings.

VI.

Count I of the indictment charges O'Brocta with conspiring with several other defendants to defraud the United States by impeding the IRS' efforts to ascertain and assess revenue through a scheme designed to conceal "the true nature and correct amounts of monies paid by Penn Iron ... for the purchase of scrapmetals." O'Brocta claims that the conspiracy conviction must fall because the government has not proven that the IRS was impeded by the cash payment scheme.

O'Brocta argues that the Internal Revenue agents who prepared the case against him were not impeded by the checks drawn to the order of fictitious payees.

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11. He testified that he last took a vacation when he got married, that he owns one car and one truck, that he never gambles in Las Vegas, that he does not "run around with other women," that he works six or seven days a week, that he does not own lavish furniture, and that there is no place in his home town to spend the large amount of income that went unreported.

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By examining those checks and comparing them with invoices Penn Iron regularly kept as part of its business records, the agents were indeed able to identify with apparently relative ease those sellers of scrap metal paid by means of the check cashing scheme. But to say that a fruitful investigation absolves those who participated in the scheme is equivalent to saying that a conspiracy must be successful before it becomes illegal. The illegality of a conspiratorial agreement, however, does not depend on the conspirators' achieving their end; even the objective impossibility of attaining the goals of a conspiracy is irrelevant to the guilt of those who conspire. *See United States v. Jannotti*, 673 F.2d 578, 591 (3d Cir. 1981) (en banc), *cert. denied*, 457 U.S. 1106 (1982). Consequently, we are not persuaded by the argument that the conviction for conspiracy cannot stand because the government was not actually impeded in its efforts to assess and collect revenue.

VII.

For the reasons explained above, the judgment of the district court will be affirmed.

SAROKIN, District Judge, dissenting:

I respectfully dissent because the court below gave with one hand a fair and accurate jury instruction, and took back with the other that which it had given.

The majority opinion recognizes as "the most troublesome aspect of this appeal" the claim that "the trial judge interfered with O'Brocta's attempt to persuade the jury of his innocence by characterizing his defense as spurious. Majority typescript at 5. The court refuses to "endorse the judge's use of the word 'spurious,'" which it labels "ill-advised," *id.* at 15, but holds that the use of such word does not constitute reversible error. The majority adds that defendant did

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not adequately preserve the entire issue for appeal, when he failed to object to the curative instruction given by the district court. *Id.* at 15-17.

In arriving at the conclusion that the trial judge did not deprive defendant of his right to a trial by jury by describing the sole defense asserted as "spurious," the majority acknowledges that, while courts may comment on the evidence adduced at trial, their discretion in doing so is not unlimited, especially in light of the great influence they have with the jury. *Quercia v. United States*, 289 U.S. 466, 470-72 (1933). The Court recognizes that "[t]here is no bright line separating remarks that are appropriate from remarks that may unduly influence a jury," and establishes a four-pronged balancing test, or "sliding scale approach" to assess the propriety of such comments. Majority typescript at 9-10. Thus, the materiality of the judicial comment, its emphatic or overbearing nature, the efficacy of any curative instruction and the prejudicial effect of the comment in light of the jury charge as a whole are to be balanced one against the other: "[t]he stronger the prejudicial effect of a statement is, the stronger must be the mitigating factors." *Id.* at 12.

For the most part, the test set forth by the majority clearly and accurately re-states the law as previously formulated by this Court. Indeed, the first three prongs of the analysis are derived directly from the Court's recent discussion of this issue in *United States v. Anton*, 597 F.2d 371, 375 (3d Cir. 1979), quoting *United States v. Gaines*, 450 F.2d 186, 189 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972). It is the fourth prong of the test here enunciated that is troubling, not so much in its formulation as in its application by the majority. In the abstract, there is no question but that the reviewing court should assess "the prejudicial effect of the comments in light of the jury instruction as a whole." Majority typescript at 12.

However, the majority here utilizes this common-sense notion to find that, in light of the correctness of the remainder of the trial judge's charge, the court's comments cannot be found to be reversible error. Indeed, both in its rendition of the facts and its legal analysis, the majority gives great weight to the fact that, other than the comment here at issue, the district court's instructions were correct. *Id.* at 5-8, 15. This is a conclusion with which I agree. However the accuracy of the charge on the law is essentially irrelevant to the issue of the appropriateness of judicial commentary on the evidence. Indeed, were the instructions incorrect, then they would provide an independent basis for reversal and eviscerate the need for this inquiry; it is their very correctness that requires the appellate court to examine the problem created by judicial comment.[1] The question that must be asked is not the extent to which the charge as a whole was wrong but whether in commenting upon the evidence the trial court exercised appropriate restraint in light of the materiality of the evidence addressed, and gave an effective curative instruction, assuring the jury that it

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1. The majority cites *United States v. Gaines*, *supra*, 450 F.2d at 190, for the proposition that "the reviewing court must assess the prejudicial effect of the comments in light of the jury instructions as a whole." *Gaines* states simply that a particular comment was not an abuse of the trial court's discretion "viewed in light of [the] complete charge." *Id.* However, the *Gaines* Court apparently referred not to the substantive correctness of the legal charge there propounded to the jury, which is never discussed, but to the immediate context of the judge's remarks, 450 F.2d at 188-89, as well as his repeated instructions to the jury as to their role as sole determiners of credibility and fact. *Id.* at 190-91 and n.9. Here, the majority cannot and does not rest its conclusion on such a limited context, but on the charge as a whole, which it finds to be correct, particularly as to willfulness. Such correctness can be, and was, undermined by the trial court's comments, which were neither properly restrained, nor effectively neutralized, as in *Gaines*.

was not bound by the court's factual conclusions. That the remainder of the charge was correct should begin, rather than end the inquiry.

However, having established a standard of review, the majority then proceeds to misapply it, as to each of the four prongs set forth. First, the majority distinguishes the instant matter from *Gaines*, in which, it says, "the judge's remarks went to the core of the defense." In so doing, the majority speculates that "[t]he trial judge's comment on the effect of the underreporting might well have been intended merely to alert the jury that [the argument that there were no actual tax consequences of defendant's actions] was not particularly relevant to the charge against O'Brocta." Majority typescript at 13.

The majority's argument that the trial court's comments did not go to the core of the defense is utterly without merit. In fact, the trial court's charge disparaged defendant's *sole* defense, that he believed that the effect of underreporting certain income was, in light of what he claimed to be on equal underreporting of certain expenditures, not illegal, since there was to be no effect on his tax bill. Defendant thus claimed that he lacked the *mens rea* required for a criminal conviction under 26 U.S.C. § 7206. *See generally United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 36-61 (1973) (the *mens rea* requirement "implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers"). The district court, while charging this *mens rea* requirement properly, then stated in no uncertain terms:

> There has been an admission here that gross expenditures were also falsely reported and an argument made that they should cancel each other

> out, and that is spurious of course, in that it omits the consideration of inventory.

The effect of this statement on defendant's case must have been devastating: the trial court judge appeared to be saying to the jury that he regarded defendant's argument, and with it, his whole defense, as "spurious." In so doing, he also expressed his opinion as to defendant's credibility, for such defense had been established primarily by defendant's own testimony. App. at 408-413. And he did so by injecting into the case an issue not otherwise charged, explained, or presented to the jury by either party, precisely as in *Quercia*. 289 U.S. at 471-72. The court thus demolished defendant's sole defense, destroyed his credibility and did so in a manner unsusceptible of review by a jury unfamiliar with the basis of the court's conclusion. While it is true, as the majority suggests, that the charge may have been intended to let the jury know that, in fact, understating both gross receipts and cost of goods sole does not create a correct tax return,[2] it is equally true that the jury may have interpreted the court's comment to meant that *as a matter of law*, the sole defense asserted was "spurious." At the very least, the charge indicated in the clearest of terms the judge's skepticism of defendant's case. To say, as the majority does, that it did not involve a material aspect of the case is to cast aside all of what defendant was attempting to prove. Furthermore, to the extent that the court's comment bore on defendant's credibility, upon which any good

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2. The judge may have been correct that, under Internal Revenue Service regulations, cost of goods sold, as it is used in arriving at an income amount, must take inventory into account. *See* 26 C.F.R. 1.471-1. However, to state that the idea that cost of goods sole and income should cancel each other out is "spurious" insults defendant's belief that they did and thereby undermines his entire defense.

faith defense must rest, it also improperly intruded on the jury's province. *Anton, supra*, 597 F.2d at 374-75.

Second, the majority concludes that the court's statement was not strong enough to warrant reversal. If this is true, it is hard to imagine what would be strong enough. "Spurious" is defined as "outwardly similar or corresponding to something without having its genuine qualities: false, counterfeit," "faulty in reasoning or conclusion: illogical, specious," or "irrelevantly inapplicable: lacking correspondence to reality: vaguely ambiguous: pseudo." *Webster's Third New International Dictionary of the English Language Unabridged* at 2212 (197). To label one's sole defense, or the facts relied upon by defendant which comprised such defense, false, fraudulent, specious or lacking correspondence to reality is a strong statement indeed, not very different in vehemence or, ultimately, in content from the statement that "[t]he court -- that is, the trial judge -- regarding [defendant] as devoid of credibility, and I do not believe [him] absolutely and in all respects" found to constitute reversible error in *Anton*, 597 F.2d at 372-73. Here too the language was strong, attacking the gravamen of the defense asserted, and impugning defendant's credibility, without such qualifying statement as had followed in *Anton*.[3] It is a statement which did not question a particular assertion of defendant, as in *United States v. Blair*, 456 F.2d 514, 519 (3d Cir. 1972), for defendant here did not assert that, in fact, receipts and costs of goods sold cancel each other out. Rather, the trial court's statement denigrated defendant's *belief* that such cancelling out occurs, the sole issue before the jury. Such "emphatic

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3. That qualifier, that "I do not believe [the defendant] absolutely and in all respects" was found not to constitute reversible error in *United States v. Kravitz*, 281 F.2d 581, 584-85 and n.4 (3d Cir. 1960), cited in *Anton, supra*, 597 F.2d at 373.

and overbearing" remarks must be viewed as an intrusion upon defendant's right to a jury trial, and as such, reversible error.

Nor was the curative instruction given by the district court adequate to dissipate the taint created by the court's prior comment. To the contrary, that instruction re-emphasized that the spuriousness of defendant's defense was the court's "conclusion":

> With respect to the court's comment on whether or not the receipts of money and expenditures of money and cash -- I may have used the word "spurious." That is solely a conclusion that the court drew.

App. at 559. The court went on to re-state such conclusion in the context of re-establishing the jury's role as factfinder.

> The opinion of the court that there is inventory is solely the opinion of the court and does not bind the jury in any way as to whether or not that would be a logical contention to make, that those two cancel each other out.

App. at 560. Hence, the judge, while not limiting himself to the "abstract instructions regarding the jury's role as factfinder" found insufficient in *Anton, supra*, 597 F.2d at 375, gave a curative instruction which re-stated his "opinion" that defendant's good faith belief did not constitute "a logical contention to make." In so doing, the court made less than vigorous efforts to remind the jurors that the facts were theirs to find: it stated only that the court's "opinion" and "conclusion" did not "bind the jury in any way," a far weaker formulation than that utilized in *Blair*, where the court reminded the jury "you use your judgment, because yours prevails, not mine . . . that is one of the facts you must determine . . . no matter what I think, it is what you think that prevails." 456 F.2d at 519.

Added emphasis and repetition in *Blair* may well have outweighed the district court's opinion expressed earlier, and reiterated after objection. Here, no such emphasis or repetition drove this point home to the jury, and the majority thus errs in describing the curative instruction given as "similar to one which the court found to be sufficient in *Blair*."

Finally, the correctness of the remainder of the charge does not excuse the district court's single erroneous instruction where, as here, that instruction undermines all that came bfore and after it. This is especially so where the judge's reminders to the jury that they were to find facts, both regarding willfulness and otherwise, were both fewer than in a case such as *Gaines*,[4] and weaker than in the other cases in which judicial comments have been addressed by this court.[5]

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4. In *Gaines*, the district court "repeatedly" told the jury that it was the finder of facts. Such instruction was only given three times in this case, including the curative instruction. App. at 525, 548, 560.

5. Here, immediately following the comment here at issue, the district court stated:

> It is for you, the jury, to determine from all the facts, all of the surrounding circumstances, whether the defendant, with respect to the three charges, acted willfully, in the sense that he knew what he was doing was contrary to law, and he knew that the statements were false.

App. at 548-49. This instruction is far less emphatic than those approved by the court in *Gaines*, 450 F.2d at 188-89, and *Blair*, 456 F.2d at 519, as to the principle that it is the jury's and not the court's role to find the facts, especially those facts upon which the court had just commented. Indeed, it is not even as effective as that found insufficient in *Anton*, where the district court had reminded the members of the jury that they were the "*sole* judges of credibility" (emphasis supplied), that his comments were "only the expression of [his] opinion," and that "at all times . . . you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts." 597 F.2d at 373.

For the Court nonetheless to find that the district court neutralized its highly prejudicial statement by virtue of sparse, lackluster and unenthusiastic admonitions, allows courts greater control over jury verdicts and paves the way for deeper inroads into the right to trial by jury than this Court has ever before allowed.

Moreover, in purporting to examine the judge's comment in context, the majority fails to account for the larger context out of which the jury charge, as a whole, grew. The record here reveals a trial judge who, throughout the trial, viewed defendant's case with a jaundiced eye. Originally unaware of the defense being presented, App. at 165-66, the court interpreted the defense narrowly throughout, often in the presence of the jury, (*e.g.*, App. at 275), and as late as the last day of trial, stated that the intent at issue was "to make a false report, knowing the law requires it.' App. at 461.[6] While I agree with the majority that the district court's rulings as to the relevancy of evidence did not constitute an abuse of the broad discretion accorded a trial judge by Federal Rule of Evidence 403, *see, e.g., United States v. Clifford*, 704 F.2d 86, 89 (3d Cir. 1983), nor are they commendable in the context of a clear pattern of skepticism toward defendant's case. Finally, it should be noted that the district court did not allow counsel an opportunity to review, or object to, much of the charge to be given prior to such instructions, which were to be adaptations of the government's proposed charges, put in the court's own language (481a-484a). Of course, no prior mention was made of the court's intention to label defendant's defense as "spurious."

The Court today not only seeks to expand the parameters of permissible judicial behavior, moving away from a sensible trend against the type of judicial

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6. *See also* App. at 487 (THE COURT: I really enjoyed [O'Brocta's] last remark . . . . We were brought up to be honest.")

commentary here allowed, and thus to contract the constitutional jury trial right guaranteed to all criminal defendants, but it does so, in part, by the needless formalism of holding that defendant did not properly preserve the issue for appeal. This conclusion is also without basis. After the district court had completed its jury instructions, counsel for defendant objected clearly and articulately to the instruction given. App. at 556. This satisfies the requirement imposed by Federal Rule of Criminal procedure 30. The majority, however, states that defendant did not properly preserve his right to object to the curative instruction as well by failing to object to that instruction after it was given.

This Court, in seeking to balance the salutary purposes that underlie Rule 30, and the potential for its degeneration into "a trap for the wary, a trap reminiscent of the senseless technicalities that characterized common law procedural systems . . .," has never before required that a party object to both a jury instruction and to the curative instruction that follows. *See United States v. Currens*, 290 F.2d 751, 578-59 (3d Cir. 1961) (failure to object to supplemental charge did not insulate issue from appeal). To so require where, as here, the issues raised by the two sets of instructions are not only inextricably intertwined but, under the majority's formulation, necessary parts of the same analysis, is to place unnecessary hurdles in the way of the litigant who seeks resolution of what is essentially one problem. Indeed, the majority here proposes a delicate balancing test, in which prejudice is to be weighed against the efficacy of a curative instruction, but then mandates that in order to invoke that test in its entirety, a defendant must object not once by twice. The unfairness of such a result is highlighted here, where the district court failed even to give counsel an opportunity to object to the supplemental charge, *see* App. at 560, a charge which was the culmination of a

series of events to which counsel had unequivocally objected. Had he objected yet one more time, there is little reason to believe that the trial court would have corrected its error, or even have been able to do so. Moreover, it should be noted that the Court here reaches out to bar defendant's appeal, although the issue was never raised by the government, which briefed and argued this issue as though properly preserved *in toto*. Appellee's Brief at 21-22. *See Currens, supra*, 290 F.2d at 760-61. The Court thus goes out of its way to reach a result not only discordant with its previous caselaw, but predicated upon a position never asserted by the government.

This is, after all, a case in which a trial court judge properly charged the jury as to a perfectly valid defense raised by a defendant, and then undermined that charge by telling the jury that, based upon his own theory of the case, that defense was spurious. That he told the jury a few times that the decision was theirs to make -- once while reiterating that the spuriousness of the defense was his "conclusion" and "opinion" -- did not dilute the effect of his earlier statements: that, in effect, he thought defendant was guilty and that defendant's testimony could not be believed. The majority here ignores reality in suggesting that the jury was nonetheless free to make its own, independent decision.

For a court thus to ridicule the sole defense asserted and reiterate its view after appropriate objection is to deny defendant his right to a fair trial by jury. Recognizing that it is not wholly inappropriate for courts to comment on the evidence adduced at trial, the majority here abandons the limiting principles that have previously been imposed on this practice by this Court and goes well beyond its holdings in prior cases regarding the propriety of judicial comment on the evidence in a criminal trial. In so doing, the Court not only fails to recognize the inherent influence that such

comments may have on jury deliberations, but also disregards the stringent requirement that a trial judge not have "abandoned his proper role" and "reached the point where 'it appears clear to the jury that the court believed the accused is guilty.'" *United States v. Beatty*, 722 F.2d 1090, 1093 (3d Cir. 1983) (citing cases).

Even those precedents which permit a judge to express his or her views on credibility and suggest that a jury properly instructed can or will ignore such comments from the court border on fantasy. But to conclude that based upon some boilerplate instructions, a jury can ignore the elevated, robed, experienced jurist who has stated that he believes the defense to be without factual or legal basis or both is to close our eyes to reality and transform a courtroom into a land of make believe.

I dissent.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit